82-2092

CASE NO.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHRIS PETTI, ALFRED GERARDO SICA, and VINCENT MONTALTO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY OF RECORD FOR PETITIONERS:
CHRIS PETTI, ALFRED GERARDO SICA and VINCENT MONTALTO

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QUESTIONS PRESENTED FOR REVIEW

1. Are authorizations for wiretap applications made by assistant Attorneys General in December and January, 1980, under a stale "special designation order" of a former Attorney General dated August, 1978, whose successor took office in August, 1979, violative of 18 USC § 2516?

2. Were wiretap orders obtained and utilized without normal investigative procedures having first been used and without a factual showing why normal investigative procedures could not have been utilized in this case?

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CHRIS PETTI, ALFRED GERARDO SICA, and VINCENT MONTALTO petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

PARTIES TO PROCEEDING

This proceeding originated in a criminal prosecution in the United States District Court for the Southern District of California wherein the United States of America was the

plaintiff and the defendants were: CHRIS PETTI, ALFRED GERARDO SICA, VINCENT MONTALTO, THOMAS PALMA and DOMINIC BARTOLATTA.

All defendants appealed from their convictions to the United States Court of Appeals for the Ninth Circuit.

The appeals were consolidated in the Court of Appeals (C.A. Nos. 82-1420, 82-1422, 82-1428, 82-1429).

Counsel for Petitioners are informed and believe that separate petitions for a writ of certiorari in this Honorable Court may be filed by DOMINIC BARTOLATTA and THOMAS PALMA.

OFFICIAL AND UNOFFICIAL REPORTS

The disposition of the consolidated appeals in the United States Court of Appeals for the Ninth Circuit was by an unpublished memorandum filed and entered on April 22, 1983. A copy of this memorandum is reproduced as Appendix "A" hereto.

Petitioners did not move the Court of Appeals for a rehearing.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the Southern District of California was based on a federal indictment charging Petitioners with conspiring to conduct, and conducting, an illegal gambling business in violation of 18 U.S.C. § § 1955 and 371.

Jurisdiction of the Court of Appeals was based on Petitioners' timely appeals from their convictions under 28 U.S.C. § 1291.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STAY OF MANDATE

A motion for stay of the mandate was made to the Court of Appeals and opposed by Government. At the time of the preparation of this Petition, the motion for stay remained pending in the Court of Appeals. If the Court of Appeals should deny a stay, upon notice thereof, Petitioners will move this Honorable Court for a stay pending final disposition of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV of the United States Constitution provides, as pertinent:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Petitioners also rely on the provisions of Title 18, United States Code, § § 2515, 2516, and 2518, the provisions of which are set forth verbatim in Appendix "B" hereof, concerning requirements for wire interception and interception of oral communications, as well as provisions prohibiting direct and derivative use of intercepted contents of communications.

STATEMENT OF THE CASE

(a) Lack of Authority for Wiretap Applications

During the term of Attorney General Griffin B. Bell, he issued Order No. 799-78, August 15, 1978, specially designating persons (not named) who served as assistant Attorneys General of certain divisions of the Justice Department to authorize applications for wiretap orders under 18 USC § 2518(1).

Attorney General Bell was succeeded in office in August, 1979, by Attorney General Benjamin Civiletti.

About a year and four months after Attorney General Civiletti had taken office, in December, 1980 and January, 1981, the wiretap orders which are the subject of this petition were issued by United States District Judges in the Districts of Southern and Central California and Nevada.

All of the applications masked the fact that the "authorizations" had been made under a "special designation" order of a predecessor Attorney General. The wiretap orders reiterated the masking language of the applications in finding the existence of authorization for the application.

It has never been shown, or even contended, that the issuing judges were specifically informed for the "order of the Attorney General" was the order of an Attorney General who had been out of office for a year and four months.

(b) Defective Affidavit

The affidavit of FBI Agent Lore was offered in support of all three wiretap applications. This was a long, rambling document containing:

(1) a description of earlier investigative activity [all of the sort which could easily have been performed in the office of the investigator] including receiving communications from informants, going over rap sheets, reviewing earlier wiretap investigations of some of the suspects; and studying phone company toll call and pen register records;

(2) General assertions that physical surveillance of the suspects had occurred, with no details as to who was observed where and when;

(3) Assertion that two unnamed informants were not willing to testify under any circumstances and that one of those two informants had expressed fear of the suspects; no details were given to objectify the reality of such fear as to any specific person;

(4) The opinion of the affiant that bookmaking cases could not be made without reliance on wiretap evidence; and

(5) A statement from the prosecutor to the affiant that a grand jury investigation would probably not be successful because the suspects would invoke their Fifth Amendment privileges against testifying, and immunization of any suspect might foreclose criminal prosecution.

(c) Pretrial Hearing

Defendants moved to suppress direct and derivative evidence from the wiretaps because of (a) lack of lawful authorizations for the wiretap applications; and (b) the failure of the Lore affidavit to set out specific *facts* of the prior investigation showing that normal investigation techniques had been used; why these techniques, if continued, would probably not be successful; or facts showing why use of such techniques would be too dangerous.

At the hearing on the issue of "authorization", the Government relied on a stale inter-departmental memorandum (dated September 27, 1979), directed only to other assistant Attorneys General to the effect that Order No. 799-78 of Attorney General Bell continued in force and was valid despite the resignation of Attorney General Bell from his office. This memorandum, never shown to have been disclosed to Attorney General Civiletti, predated the purported "authorizations" in this case by some fifteen (15) months (September 27, 1979 to December 23, 1980).

The trial court denied the suppression motion without a written decision, or any explanation.

No expression was made by the trial court at any time as to the lack of valid authorization to apply for the wiretap orders.

As to the defective Lore Affidavit, the trial court did express concern of having great difficulty in upholding the sufficiency of the affidavit, but his conclusion that the issue "ends up being, really, almost Boiler Plate on all these wiretap applications in gambling cases." Although the trial court asserted it would make a written ruling on that issue, it did not do so.

(d) The Trial

Defendants agreed to a bench trial on a written stipulation of the content of the testimony which Government's witnesses would have offered. This stipulation encompassed both direct and derivative wiretap evidence and specified that the testimony of two Government witnesses was directly derived from the court-ordered wire interceptions.

Defendants were adjudged guilty and sentenced to heavy fines, imprisonment and lengthy terms of probation.

(e) Court of Appeals Disposition

The Court of Appeals summarily rejected the contention that the wiretap applications were made without authority as required in 18 USC § 2516(1); § 2518(1); § 2518(4) (d).

The Court of Appeals relied exclusive on the doctrine of "administrative continuity" as applied in two cases, not involving the use of wiretaps.

In re Weir, 520 F2d 662 (9th Cir. 1975) involved an Attorney General's grant of immunity to a witness who argued that because of a change in administrations, he was no longer required to testify. *United States v Morton Salt Co.,* 216 FSupp 250 (D. Minn. 1962), affirmed without opinion, (per curiam), (1965) 382 US 44, 86 SCt 181, 15 LEd2d 36.

The Court of Appeals did not even mention *United States v Giordano,* 416 US 505, 40 LEd2d 341, 94 SCt 1820 (1974).

As to the asserted deficiencies of the Lore affidavit, the Court of Appeals asserted that the affidavit "contained particularized and detailed information to show that normal investigative methods had been tried and failed and were reasonably unlikely to succeed in the future or would be too dangerous. Essentially, a "boiler plate" affidavit produced a "boiler plate" decision in the Court of Appeals.

ARGUMENT FOR WRIT

1. The Court of Appeals decision is contrary to *United States v Giordano,* supra, which required strict compliance with the requirements of 18 USC § 2516 (1) and ordered suppression for the lack of compliance in that case. This Honorable Court declared the Congressional intent was to

limit the giving of authority to apply for wiretap orders to those responsive to the political process, and that the statute did not permit the Attorney General to delegate his authority at will, whether it be to his executive assistant, or any other departmental officer except an Assistant Attorney General. An "executive assistant" did not belong to a category of persons to whom authority could be delegated. The Court of Appeals decision, *United States v Giordano*, 469 F2d 522 (4th Cir. 1972, J. Sobeloff) was affirmed. This Honorable Court did not expressly adopt Circuit Judge Sobeloff's language, but that language cogently expresses the principle involved in the present case.[1]

. . .

2. The Lore affidavit was not in compliance with the requirements of 18 USC § 2518(1)(c) which requires a "full and complete" disclosure of the investigative procedures which have already been tried and failed, or why they

[1] ". . . The premise is that future alter egos [executive assistants] will always act within guidelines created by the Attorney General and that future Attorneys General will then always acknowledge responsibility for authorizations penned in their names. Our concern here is not primarily with past action of a former Attorney General [John N. Mitchell], but rather the future consequence of sanctioning an alternative scheme which could be abused hereafter to evade the congressional policy of locating responsibility for wiretap applications with the Attorney General and a limited number of his designated assistants. If we should accept the Government's reasoning, there can be no assurance that in some future case, if the particular wiretap authorization proved politically embarrassing, the Attorney General would not then repudiate his 'Lindenbaum.' The Attorney General would always be able to say with the benefit of hindsight that the subordinate had betrayed his confidence, acting beyond the scope of his responsibility, and the actions taken were not those of an agent. The alter ego theory destroys the concept of establishing identifiable responsibility at a certain level of government." (469 F2d at 528-9)

reasonably appear to be unlikely to succeed if tried, or to be too dangerous. Under 18 USC § 2518(3)(c), a judge is required before issuing a wiretap order to have determined in the basis of the "facts" submitted by the applicant that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

These requirements were considered in *United States v Kalustian*, 529 F2d 585, 588-590 (9th Cir. 1976). The requirements were found, under the legislative history of Title III, to be for the purpose of protecting the privacy of communications and to express, on a *uniform basis* the circumstances and conditions under which interception could be permitted. The stringent requirements of the legislation were deemed necessary to bring electronic eavesdropping within the limits of the Fourth Amendment of the United States Constitution, expressed in *Berger v New York*, 388 US 41, 63, 97 SCt 1873, 18 LEd2d 1040 (1967). *Kalustian* expressly rejected the notion that illegal gambling activity constituted a class of behavior which could not be successfully prosecuted without electronic surveillance evidence. *Kalustian* also rejected affaint "conclusions" on a basis for wiretap authority because conclusions do not provide *facts* from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative to wiretapping.

The Court of Appeals memorandum decision is written as if *Kalustian* had never been decided.

This Honorable Court has never rendered an opinion expressing the foundational limits which must be contained in the affidavit as to the factual matters which must be displayed by the applicant and found by the issuing judge. This is a proper case to address such issue.

3. The present case from the Ninth Circuit, and increasingly, those from other Circuits, demonstrate a pervailing laxity of applicants to comply strictly, with the express requirements of Title III, and the tendency of the Courts of Appeal to allow electronic surveillance on scanty factual bases. Routinely, wiretap orders are prepared by the staff of the prosecutor or an investigative agency, and it appears that orders are being signed and issued by judges or magistrates on the basis of a superficial examination of supporting affidavits. If certiorari be granted herein, Petitioners will analyze the cases for the Court to demonstrate the assertions herein made.

4. Only fifteen (15) years have gone by since Title III was enacted. The necessities for stringent requirements in the Act and for strict compliance with the Act have not lessened in that time, and the Act has *not* been amended by Congress to reduce the requirements for the granting of wiretap authority. Yet it must be apparent to this Honorable Court, as to practicitioners at large, that if a conviction of the defendants is obtained, challenges to the denial of suppression motions will not be upheld if there is any face-saving basis on which to deny the challenge; or, as in the present case, by what is virtually a summary determination. The result is that wiretap-

ping has become enshrined as a device of search and seizure which is justified by what is found, contrary to the Fourth Amendment and Title III.

Respectfully submitted:

OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY OF RECORD FOR PETITIONERS:
CHRIS PETTI, ALFRED GERARDO SICA and VINCENT MONTALTO

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NOS. 82-1420,
	)	82-1421,
Plaintiff/Appellee,	)	82-1422,
	)	82-1428,
vs.	)	82-1429
	)	
CHRIS PETTI,	)	USDC NOS.
Aka CHRIS POULOS,	)	CR-81-1037-1-
	)	LCN
ALFRED GERARDO SICA,	)	CR-81-1037-2-
Aka FRED SICA,	)	LCN
	)	CR-81-1037-4
VINCENT MONTALTO,	)	-LCN
	)	CR-81-1037-3
THOMAS PALMA, and	)	LCN
	)	CR-81-1037-5
DOMINIC BARTOLATTA,	)	LCN
Aka DANNY,	)	
	)	
Defendants/Appellants.	)	MEMORANDUM

Argued and Submitted: February 11, 1983

Appeal from the United States District Court
for the Southern District of California
Honorable Leland C. Nielsen, Judge Presiding

Before: NELSON and NORRIS, Circuit Judges, and SOLOMON,* District Judge

Appellants Chris Petti, Alfred Sica, Vincent Montalto, Thomas Palma, and Dominic Bartolatta appeal from their convictions for conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 1371 and for conducting an illegal gambling business in violation of 18 U.S.C. § 1955. Appellants' arguments on appeal are without merit; we therefore affirm.

The district court did not err in determining that the government had made adequate showings of "necessity" to support the San Diego, Las Vegas, and Los Angeles wiretaps.[1] Each of the affidavits contained particularized and detailed information to show that normal investigative methods had been tried and failed and were reasonably unlikely to succeed in the future or would be too dangerous. 18 U.S.C. § 2518 (1) (c), (3) (c).

The San Diego and Los Angeles wiretap authorizations were valid. Under the doctrine of administrative continuity, the designations of authority made by Attorney General Bell continued in effect after the expiration of his term. *See In re Weir*, 520 F.2d 662 (9th Cir. 1975); *United States v. Mor-*

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]Appellant Palma has standing to challenge the Los Angeles wiretap only. *See Alderman v. United States*, 394 U.S. 165, 176 (1968) (an individual whose conversations were intercepted has standing to assert the illegality of a wiretap order). Appellant Bartolatta has standing to challenge the San Diego wiretap because of his proprietary interest in the premises where the tapped conversations took place. *See id.* (an individual has standing to assert illegality of wiretap if conversations occurred on his premises).

ton Salt Co., 216 F. Supp. 250, 256 (D. Minn. 1962), *aff'd*, 382 U.S. 44 (1965) (per curiam).

All of the other arguments raised by appellants Palma and Bartolatta are without merit.

We therefore affirm the district court.

AFFIRMED.

APPENDIX "B"

TEXT OF STATUTORY PROVISIONS INVOLVED

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of —

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code [42 USCS §§2274-2277] (relating to the enforcement of the Atomic Energy

Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code [29 USCS § 186 or 501(c)] (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause

to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and

have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assis-

tance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6)Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspirational activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other

comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the

termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order of the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction in the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or pro-

ceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying

such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Nos. 82-2092 and 83-252

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHRIS PETTI, ET AL.

v.

UNITED STATES OF AMERICA

DOMINIC BARTOLATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2092

CHRIS PETTI, ET AL.

v.

UNITED STATES OF AMERICA

No. 83-252

DOMINIC BARTOLATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Assistant Attorney General who authorized the application for telephone interceptions had no authority to do so, and that the affidavit supporting the application for the initial interception inadequately demonstrated that other investigatory techniques were ineffective.

1. Following a bench trial in the United States District Court for the Southern District of California, petitioners were convicted of conducting an illegal gambling business,

in violation of 18 U.S.C. 1955 (Count 2), and conspiring to do so, in violation of 18 U.S.C. 371 (Count 1).[1] Petitioner Petti was sentenced to imprisonment for a year and a day and fined $10,000 on Count 1, and was given a suspended sentence, five years' probation, and a fine of $15,000 on Count 2. Petitioner Sica was fined $10,000 on Count 1, and was given a suspended sentence, five years' probation, and a $15,000 fine on Count 2. Petitioner Montalto was sentenced to six months' imprisonment on Count 1, and was given a suspended sentence, five years' probation, and a $10,000 fine on Count 2. Petitioner Bartolatta was sentenced to imprisonment for a year and a day and fined $10,000 on Count 1, and was given a suspended sentence, five years' probation, and a fine of $10,000 on Count 2.

The evidence at trial showed that petitioners were involved in a gambling enterprise that handled wagers on professional and college football games from the fall of 1977 until approximately January 1981. Petitioners Petti and Sica owned, financed, managed, and directed one portion of the enterprise, and petitioner Bartolatta owned, financed, managed, and directed the other. The "line" information on the games was supplied to both groups by petitioner Montalto, and both had a common clerk.

Prior to trial petitioners moved to suppress evidence obtained from the court ordered telephone interceptions, claiming that they were not properly authorized by an Assistant Attorney General under 18 U.S.C. 2516(1) and that the affidavit filed in support of the application for the initial order failed to set out specific facts sufficient to show that other investigative techniques had been tried and failed

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[1] Petitioners Petti and Montalto were acquitted on two counts charging interstate transmission of wagering information, in violation of 18 U.S.C. 1084.

or were unlikely to succeed if tried or would be too dangerous, as required by 18 U.S.C. 2518(1)(c).[2] After an evidentiary hearing, the district court denied the supression motions.

2. Petitioners first maintain (Pet. 7-8)[3] that the intercept applications made in December 1980 and January 1981 were unlawful because they were authorized by an Assistant Attorney General specially designated by former Attorney General Griffin Bell on August 15, 1978, rather than by his successor in office, Benjamin Civiletti.[4] Petitioners' claim does not merit review by this Court.

The statute, 18 U.S.C. 2516, provides that "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge" for an intercept order. Here, the application was authorized by an Assistant Attorney General under the specific designation of the Attorney General, albeit the prior Attorney General. That designation satisfied the statutory requirement.

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[2]The subsequent applications relied in part on information obtained in the original interception. Accordingly, if the first interception was not properly authorized, the subsequent interceptions would have been tainted by the initial illegality.

[3]"Pet." references are to Petition, No. 82-2092, which is incorporated by reference in Petition, No. 83-252 (at 4-5).

[4]By order No. 799-78 of August 15, 1978, Attorney General Bell specially designated the Assistant Attorney General in charge of the Criminal Division and, upon his absence or unavailability, the Assistant Attorney General in charge of the Tax Division to exercise the power under 18 U.S.C. 2516(1) to authorize applications for intercept orders. Both designations were by title only, not by name. The challenged applications were authorized by M. Carr Ferguson, who was Assistant Attorney General in charge of the Tax Division both in August 1978 and at the time of the authorization.

Contrary to petitioners' argument, nothing in *United States* v. *Giordano*, 416 U.S. 505 (1974) (authorization by Attorney General's executive assistant not permitted by 18 U.S.C. 2516) casts any doubt on the applicability to this situation of the basic principle of administrative law that "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office." *United States* v. *Wyder*, 674 F.2d 224, 227 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). See also *In re Weir*, 520 F.2d 662, 667 (9th Cir. 1975) ("The rules and orders of an Attorney General continue to govern the Department of Justice (notwithstanding the advent of new Attorneys General) until they are changed or altered"). Moreover, as the court said in *Wyder, supra*, 674 F.2d at 227, in rejecting a substantially identical objection to the continuing effect of Attorney General Bell's order of August 15, 1978, it "cannot rationally [be] maintain[ed] that Assistant Attorney General [Ferguson] was exercising his authority without the knowledge and consent of Attorney General Civiletti."

3. Petitioners also contend (Pet. 9-11) that the affidavit failed to comply with 18 U.S.C. 2518(1)(c), arguing that insufficient facts were alleged to show that other investigative procedures could not have been successfully utilized. The court below properly rejected this claim.

The role of the appellate court in reviewing the sufficiency of an application for an intercept order "is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made." *United States* v. *Scibelli*, 549 F.2d 222, 226 (1st Cir.), cert. denied, 431 U.S. 960 (1977). The statute, 18 U.S.C. 2518(1)(c), requires that an application for an intercept order show that "other investigative

procedures have been tried and failed or * * * reasonably appear to be unlikely to succeed if tried or to be too dangerous." It is established that "the purpose of § 2518(1)(c) was not to 'foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques.' " *United States* v. *Feldman*, 535 F.2d 1175, 1179 (9th Cir.), cert. denied, 429 U.S. 940 (1976) (quoting *United States* v. *Robertson*, 504 F.2d 289, 293 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975)). See *United States* v. *Smith*, 519 F.2d 516, 518 (9th Cir. 1975). While electronic surveillance is not to be routinely employed as the initial step in a criminal investigation, *United States* v. *Giordano, supra*, 416 U.S. at 515, the law does not require that such surveillance "be used only as a last resort." *United States* v. *Bailey*, 607 F.2d 237, 242 (9th Cir. 1979); *United States* v. *Spagnuolo*, 549 F.2d 705, 709-710 (9th Cir. 1977). Finally, ordinary investigative procedures need not be completely unsuccessful before an intercept can be authorized; "[t]hey need only to have reached a stage where further use cannot reasonably be required." *United States* v. *Spagnuolo, supra*, 549 F.2d at 710, n.1.

The court below, consistently with its earlier decision in *United States* v. *Kalustian*, 529 F.2d 585 (9th Cir. 1975), correctly found that the government had made adequate showings of necessity to support the application in question by reciting "particularized and detailed information" to support the asserted inadequacy of other investigatory techniques (Pet. App. 2a). See Aff. 53-59.[5] In particular, the affidavit described the normal investigative methods that

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[5] "Aff." refers to the December 23, 1980, affidavit in support of the intercept application. We are lodging a copy of that affidavit with the Clerk of this Court.

had been tried with limited success during the four-month investigation conducted prior to the application (Aff. 7-43). It also stated that the two most important informants were unwilling to testify in open court because they feared petitioners Petti, Sica, and Montalto (Aff. 53). In addition, the affidavit described why other investigative techniques, such as ordinary surveillance or searches pursuant to a traditional search warrant, were unlikely to be successful in this kind of illegal gambling operation (Aff. 4-7, 53-59).[6] The court of appeals correctly found this showing adequate to satisfy the statute, and there is no occasion for further review of that fact-bound determination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[6]Even more specifically, the affidavit indicated that petitioner Petti was extremely cautious and monitored his surroundings carefully (Aff. 55).

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